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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1457

SUMITOMO FORESTRY CO., LTD.,
of Japan,
Petitioner,

v.

THURSTON COUNTY, WASHINGTON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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COMES NOW Thurston County, State of Washington, a municipal corporation, (hereinafter "Thurston County") and, pursuant to Rule 24(1), herewith respectfully submits its Brief in Opposition to Petition for Writ of Certiorari in the above-entitled matter.

I.

OPINIONS BELOW

The Respondent accepts the recitation of the opinions below as contained in the Petitioner's Petition.

II.

JURISDICTIONAL STATEMENT

Jurisdiction in the Supreme Court to review the decision for the Court of Appeals for the Ninth Circuit by Writ of Certiorari is given by 28 USC Section 1254.

III.

CONSTITUTIONAL PROVISIONS

Respondent accepts the Statement of Constitutional Provisions as contained in the Petitioner's Petition for Writ of Certiorari.

IV.

QUESTION PRESENTED

Respondent accepts the question presented as contained in Petitioner's Petition for Certiorari in the above-referenced matter.

V.

STATEMENT OF THE CASE

The Statement of the Case contained in the Petitioner's Petition or Writ of Certiorari on file in the above-entitled matter includes the petitioner's arguments with respect to its petition. Accordingly, the Respondent, not wishing to accept the argument of Petitioner as being facts of the case, respectfully rejects the Statement of the Case contained in the Petition on file herein.

This matter was presented to the United States District Court, Western District of Washington, at Seattle, upon an agreed Statement of Facts. That agreed Statement is essentially contained as the Findings of Fact, in the Findings of Fact and Conclusions of Law made and entered by

the United States District Court. A copy of those findings is appended (Appendix A) to the Petitioner's petition on file herein.

It is respectively submitted that those findings alone constitute the statement of the case before the court in the above-entitled matter.

VI.

ARGUMENT

The instant petition is addressed to the sound discretion of the Supreme Court; Petitioner seeks review by certiorari, under Rule 19(1)(b), and the only portion of that Rule which might apply to the above-entitled matter is that portion providing for review by this Court where a Court of Appeals "has decided a Federal question in a way in conflict with applicable decisions of this Court." There is no suggestion in the petition on file herein that the Court of Appeals has decided this case in conflict with the decision of another such court, or that the Court of Appeals touched upon a question of state law, or that the Court of Appeals has so far departed from the accepted course of judicial proceeding as to call for an exercise of this Court's power of supervision. Thus the Petitioner suggests that this Court exercise its discretion in its favor, granting certiorari, based solely upon the Petitioner's disagreement with the conclusions of law expressed by the Court of Appeals.

Petitioner does suggest, however (Petition, pages 15-16), that the decision of the Court of Appeals is in conflict with two recent decisions of the Supreme Court of the State of Washington: *Carrington Company v. Department of Revenue*, 84 Wn.2d 444, 527 P.2d 74 (1974), and, *Tacoma v.*

General Metals of Tacoma, Inc., 84 Wn.2d 560, 527 P.2d 1314 (1974). Respondent's counsel is advised that the *Carrington* opinion is before this Court upon application for certiorari, under this Court's Cause No. 74-1238. It thus appears that any confusion raised by the *Carrington* opinion can be directly resolved by this Court, without resort to a grant of certiorari in the above-captioned matter. It also appears that the decisions are distinguishable. In *Carrington*, the goods which the state sought to tax had been purchased for the sole purpose of satisfying a government contract, calling for the export of the goods to Southeast Asia. The goods were taxed after they had been loaded aboard trucks and transported to a Tacoma packing facility. The sole purpose of the packing facility was to crate the goods as a part of their export journey. Materials were held at the packing facility for seven or eight days before being loaded aboard a ship or airlifted out. It thus appears that the goods in *Carrington* were continually on their international journey at the time the tax was assessed. The logs in the case at bar remained at a storage facility for an average of forty-five days; individual logs might remain at the storage facility for up to one year. No function was performed at the storage facility which in any way prepared the logs for their shipment. Rather, while at the storage facility in the case at bar, the logs merely sat immobile, awaiting a ship's ultimate arrival.

In the *General Metals* case, the City of Tacoma attempted to collect a tax based upon the sale of goods by a domestic supplier to a licensed exporter. It was the sale itself that the city sought to tax. The *General Metals* case thus falls within the Rule established by this Court in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S.

69, 91 L. Ed. 80, 67 S. Ct. 156 (1946). Moreover, the Washington Supreme Court further held that the tax sought to be collected by the City of Tacoma in *General Metals*, fell within a prohibition contained in Tacoma City Rule 177; the *General Metals* decision thus rests upon a construction of state law. The case at bar has no basis in state law for the determination reached below; moreover, the tax imposed in the case at bar was an *ad valorem* tax upon goods found to be in storage at the annual inspection date. There was no tax assessed by the Respondent upon the basis of volume of sales conducted.

In the case at bar, Sumitomo contracted to purchase logs from several suppliers with the anticipation of exporting those logs to Japan. The suppliers harvested logs meeting contract specifications at innumerable locations in the vicinity of the Port of Olympia. As the logs were harvested, they were trucked to the storage facility near the Port of Olympia, there they were sorted by species, graded and piled. From that time, until they were eventually trucked to dockside for loading aboard ships, nothing was done to the logs, nor were the logs moved. The logs had not been collected and then shipped en masse to the Port of Olympia storage facility; rather, their first point of collection was at the Port of Olympia storage facility. The logs in the case at bar are thus indistinguishable from the logs held taxable in *Coe v. Errol*, 62 N.H. 303 (1882), *aff'd*, 116 U.S. 517, 29 L. Ed. 715, 6 S. Ct. 475 (1886). Two classes of logs were involved in *Coe*. The first of these was described as follows by the New Hampshire Supreme Court [62 N.H. 303, 311-312]:

> "The petitioner ° ° ° asks for an abatement of the taxes assessed by the defendant town ° ° ° upon a lot

> of logs therein * * * which had been cut and drawn there during the preceeding winters from Wentworth's Location in this state * * *. It is * * * admitted to be true, that at the time the assessments were made the 'logs were being taken by the owners on the way to Maine, to be manufactured and sold;' and the claim of petitioner is, that they were not subject to taxation in Errol 'for the reason that they were in transit to market from one state to another * * *.'"

As to these logs the tax was upheld by the New Hampshire Supreme Court, and the United States Supreme Court affirmed, saying [116 U.S. 517, 525, 29 L. Ed. 715, 718, 6 S. Ct. 475, 477]:

> "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or on a line of a railroad, such products are not yet exports, nor are they in the process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state, to the state of their destination."

There is no legerdemain which will distinguish the logs in the case at bar from those held taxable in *Coe*. The logs held taxable in *Coe*, and those in the case at bar, had each been collected prior to commencement of their ultimate export journey. Had the logs in the case at bar been collected elsewhere, and then shipped en masse to the Port of Olympia storage facility, then the logs would have fallen within the second class of logs discussed in *Coe*. Thus *Coe* must govern the case at bar, unless *Coe* has since been overruled.

Any doubt with respect to the continued validity of the holding in *Coe* has been recently dispelled by this Court in *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 40 L. Ed. 2d 660, 94 S. Ct. 2108 (1974). In *Kosydar*, this

Court dealt with the taxability of certain business machinery, manufactured exclusively for the export market, and where ultimate export appeared virtually certain. This Court rejected any theory relating to certainty of export, and reaffirmed the principle that goods must actually enter the export stream of commerce before the immunity of the Import-Export Clause would attach. [417 U.S. 62, 71, 40 L. Ed. 2d 660, 667, 94 S. Ct. 2108, 2113-2114]:

> "It may be said that insistence upon an actual movement into the stream of export in the case at hand represents an overly wooden or machanistic application of the *Coe* doctrine.
>
> * * *
>
> "Our prior cases have determined that the protections of the Import-Export Clause are not available until the article at issue begins its physical entry into the stream of exportation. We find no reason to depart from that settled doctrine."

In its Petition (pages 14-15), the Petitioner objects to certain language found in the opinion of the court below. Specifically, Petitioner objects to the mention of a prior interstate journey, involved in the case of *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 73 L. Ed. 626, 49 S. Ct. 292 (1929). In *Carson*, oil had first been collected from the production area and gathered at a refinery. After refining, the oil had been shipped to a port in Louisiana, for its ultimate transshipment overseas. In *Carson*, this Court correctly held that the journey in international commerce had begun when the refined fuel left the refinery; its incidental storage at the port, to facilitate unloading from railway tank cars and onloading onto ships, did not constitute a break in a continuous journey. Petitioner suggests that the opinion of the court below is based upon a theory that an interstate

journey must first commence, before the constitutional tax immunity attaches. The court below mentioned the interstate character of the journey involved in *Carson*. By its final footnote (footnote No. 7), the court dispells any notion that its ruling with respect to the *Carson* case relied upon the interstate character of the journey there involved. Petitioner suggests that the decision of the court below might have been different, had the logs commenced their international journey from a point outside the state of Washington. Surely, the decision of the court below would have been different in such a case; similarly, it is equally certain that the decision of the court below would have been different had the logs commenced their international journey, prior to the imposition of the tax, from a point within the state of Washington. The decision of the court below was correctly based upon the fact that the logs in question had simply not begun their journey; they had been merely collected for the purpose of eventually beginning their journey. The decision of the court below is clear, and in all respects, correct.

VII.
CONCLUSION

It is respectfully submitted that the decision of the court below correctly applies the principles established by this Court. Further, it is respectfully submitted that this Court ought not to grant certiorari to consider a question recently decided by this Court in *Kosydar*, and correctly applied

in the court below. Thurston County prays that this Court deny certiorari in the above-entitled cause.

Respectfully submitted,

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